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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 276. 37

SHIRLEY C. ASHBY, APPELLANT,

vs.

SIDNEY M. HALL, AND HENRY M. PARCHEN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED SEPTEMBER 10, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the 3rd Judicial District Court — Lewis & Clarke County, Montana Territory. In Chancery.

SIDNEY M. HALL and HENRY M. PARCHEN *vs.* SHIRLEY C. ASHBY.

Be it remembered that among the pleadings, records, and proceedings filed, made, and had in the above-entitled action in said district court are the following, to wit:

On the 8th day of November, A. D. 1873, the plaintiffs filed in said action their amended complaint, of which, in words and figures, the following is a copy, to wit:

In the 3rd Judicial District Court — Lewis & Clarke County, Montana Territory. In Chancery.

SIDNEY M. HALL and HENRY M. PARCHEN *vs.* SHIRLEY C. ASHBY.

2 To the Hon. D. S. Wade, judge of said court:

Your orators, Sidney M. Hall and Henry M. Parchen, citizens of the United States, of the Territory of Montana, hereby complaining, show unto this honorable court that since the first day of May, A. D. 1865, your orator, Sidney M. Hall, through his grantors and predecessors in interest, has been the owner of lot No. 35, in block No. 28, Helena city, Lewis and Clarke county, in the Territory of Montana, together with all the appurtenances, easements, and rights of way thereunto belonging or in any wise appertaining.

And your orators further show that since said time your orator, Henry M. Parchen, his grantors and predecessors in interest, have been the owners of lots No. 33 and 34 in said block, adjoining said lot No. 35, with all the appurtenances, easements, and rights of way thereunto belonging or in any wise appertaining, and your orators have been in possession as aforesaid each of his property since said time and lawfully entitled thereto, and during said time and up to

3 the time of the commencement of the wrongs hereinafter complained of have jointly and mutually been in the peaceable and quiet possession, use, and enjoyment of the premises hereinafter further described as an alley, easement, and right of way to and from said premises, on foot or otherwise, to the highway known in said city as Rodney street, and entitled to the same; that said premises so claimed for a right of way are described as follows, to wit: sixteen feet wide, extending along the southerly end and rear of said lots Nos. 33, 34, & 35 to said Rodney street; that said right of way is necessary to the use and enjoyment of said lots so owned and occupied by your orators, and was set apart, used, & enjoyed by your orators, their grantors and predecessors in interest, by common consent of adjoining claimants and general usage prior to the survey of what is known as the Helena town site, and reserved for such purpose at all times by order of the probate judge of said county as trustee for the claimants, pre-emptors, or owners, in the entry of said town site as provided by law, all of which defendant well knew; yet

the said defendant, disregarding the rights of your orators, on
4 or about the first day of May, A. D. 1872, wrongfully and unlawfully obstructed said way by fencing across the same, and has since said time continued said obstruction, and threatens to continue the same, and deprive your orators of their just rights as aforesaid.

Wherefore your orators pray that by judgment and decree of this honorable court the defendant be compelled to remove said fence and all other obstructions from said premises, and that he be perpetually enjoined from obstructing the same in any manner whatever, and that your orators have such other and further relief as this honorable court may deem just.

TOOLE & TOOLE,
R. LAWRENCE,
Att'ys for Plaintiffs.

MONTANA TERRITORY,)
Lewis and Clarke County,) ss

Henry M. Parchen, being duly sworn, says: I am one of the plaintiffs herein; I have heard the foregoing complaint read and know the contents thereof, and that the same is true of my own knowledge.

5 HENRY M. PARCHEN.

Subscribed and sworn to before me this 7th day of November, A. D. 1873.

R. LAWRENCE,
Notary Public.

And on the 5th day of March, A. D. 1874, the defendant, Shirley C. Ashby, filed in said action his answer to plaintiffs' complaint in words and figures following, to wit:

Answer.

(Title of cause. Title of court.)

The defendant, Shirley C. Ashby, for answer to the amended bill of complaint of Sidney M. Hall and Henry M. Parchen, denies that the said plaintiffs, or either of them, have been in the possession, use, or enjoyment of the alleged pretended and described alley, easement, or right of way in their said amended bill of complaint mentioned, or any thereof; and said defendant doth further deny that now or at the time of the committing of the acts by defendant set forth
6 in said amended bill and therein alleged to have been wrongful, or at any other time, said plaintiffs, or either of them, are or were entitled to the possession, use, occupancy, or enjoyment thereof, or any thereof.

And as to the said premises in said amended bill of complaint described as an alley, easement, and right of way, this defendant doth deny that the same, or any thereof, ever was or that it is an alley; and he denies that the said plaintiffs, or either of them, now have or ever had, owned, or enjoyed any easement or right of way thereon;

and the said defendant doth further deny that said right of way is necessary to the use, enjoyment, or occupancy of said lots of plaintiffs in said complaint described, or any thereof; and he denies that the said premises were ever set apart by plaintiffs or their grantors, or either of them *of them* or any of them, or by adjoining claimants, for the purpose of an alley or way, or that it was so used or enjoyed; and he denies that they, or any of them, ever had or owned the same, or any thereof, so that they might or could set the same apart or dedicate the same to the uses or purposes in said amended
7 bill alleged.

And the said defendant further denies that said premises were at any time reserved for an alley by the probate judge of said county as trustee or otherwise, as provided by law or otherwise. But this defendant alleges the fact to be that the same was a part and parcel of the public domain of the United States until the entry of the said town site of Helena, since which time it has been subject to entry as are the other portions of said town site, and to occupancy as are other lands within the limits of said town, and being so liable to occupancy as aforesaid, this defendant, as he well might, has proceeded to occupy the same with the view to its entry as a portion of such town site, and has made application therefor to the probate judge, trustee for such occupants. And your orator alleges that he was and is the owner of premises adjoining said described premises, and that the use and occupancy of said described premises are convenient and necessary for him in the use, occupancy, and enjoyment of his said premises adjoining the same.

8 Defendant further says that in the survey of said town site authorized by law to be made, which was submitted to and accepted by the board of county commissioners of said Lewis and Clarke county, the same was not laid out, surveyed, or declared to be an alley, way, or road, but the same was accepted as a part of the domain of the town site to be used, owned, and occupied upon such terms and conditions as were the other parts of said town site and liable to occupancy and entry accordingly. Whereupon this defendant entered on and occupied the same, and not otherwise; and these are the entries and this the occupancy set forth in said amended bill.

Wherefore the defendant denies that he ever unlawfully or wrongfully obstructed said way by fencing or otherwise, or that he ever threatened so to do, and he prays judgment for his costs.

W. F. SANDERS,
Att'y for Defendant.

Here follows verification in due form.

9 And on the 17th day of November, A. D. 1874, the defendant filed his supplemental answer to plaintiffs' complaint in said action, of which the following is a copy, to wit:

Supplemental Answer.

Title of cause. Title of court.

And now comes the defendant, Shirley C. Ashby, and for supplemental answer to the amended complaint of the plaintiffs alleges that heretofore, to wit, on the 13th day of March, A. D. 1874, upon the application of said defendant therefor to the probate judge in and for said county, the said probate judge, as he well might, did sell and convey to this defendant the premises described as a way or alley in the said complaint set forth and described, and the said defendant is now the owner and holder thereof and entitled to the same without let or hindrance from the said plaintiffs or either of them. Wherefore the defendant prays judgment as in his answer to the said amended complaint is prayed.

W. F. SANDERS,
Att'y for Def't.

Verification.

10 And on the 18th day of November, A. D. 1874, the plaintiffs filed their replication to defendant's answer in said action, of which the following is a copy, to wit:

Replication.

Title of cause. Title of court.

Now comes the plaintiffs, and, by agreement of parties and leave of the court had and obtained, file this their replication to the answer and supplemental — herein as if filed before the commencement of the trial herein, and denies that said sixteen feet of ground designated as an alley in said complaint was part of the public domain or subject to entry in any manner by defendant or any other persons; deny that said defendant had any right to occupy said property with a view to entry or otherwise; admit that said defendant is the owner of the adjoining lot or premises to said property, and aver that the same was and is bounded by said alley designated by the said defendant's grantors and owner at the time of said lot, premises, and property; admit that said alley or property was and is convenient to said defendant as such adjacent lot
11 owner.

Deny that said defendant has or had any right to enter upon, occupy, or enter said property or any part thereof, and charges and avers that said sixteen feet of ground had hitherto been entered and conveyed by said probate judge to the said defendant, adjacent lot owners, and thereby became and was an alley and subject to the use of plaintiffs and the public as such.

And plaintiffs, for further replication, deny that defendant has entered and obtained a title to said property or alley, or that any right or title thereto was obtained by reason of such entry or convevance.

Plaintiff, in replication to said answer and supplemental answer, further show unto this honorable court that after the entry upon and

occupancy of said property described in said complaint by defendant, with a view to the entry thereof, the said plaintiffs, being adjacent lot owners, called upon said defendant in reference to the said obstruction mentioned, and that said defendant promised and agreed to remove the same if said plaintiffs would build upon and im-
12 prove said adjacent lot or lots, and that he would recognize and keep open the said alley; that, relying thereon, said plaintiffs did improve the said property and expend a large amount of labor and money, which they would not otherwise have done except by reason and on account of said promise and agreement; that unless said obstruction be removed, as prayed for in said complaint, said plaintiffs will suffer great wrong and injury.

Wherefore they pray that the relief in said complaint demanded be granted.

CHUMASERO & CHADWICK,
LAWRENCE & TOOLE & TOOLE,
Atty's for Plaintiffs.

Verification in Form.

And on the 2d day of January, A. D. 1879, the court made & filed the following findings of fact in said action, to wit:

13 *Findings of Fact.*

Title of cause. Title of court.

In this action the court finds the following facts and conclusions of law thereupon, to wit:

First. That Scott's addition to the town of Helena was laid out, surveyed, and platted in the spring of the year 1866, with sixteen-feet alleys through the center of the blocks thereof in an easterly and westerly direction, in which was comprised the 90 feet of alley in controversy, the title to the ground of which and as to all the ground occupied by the town and the streets and alleys thereof being at the time and until the entry of the town site in 1869 in the Government of the United States.

Second. That the original occupants of the lots adjoin*ed* that portion of the alley involved in this action respected and recognized said alley, as did their grantors and successors in interest, up to and at the date of the entry of said town site by the probate judge of said county, and that the respective parties hereto accepted
14 and received deeds to their lots adjacent thereto bounded by said alley, and in locating, fencing, and occupying their lots respected, marked, and bounded said alley. At the western boundary of the ground in controversy and at the eastern boundary of the Watson lot said alley, as surveyed and platted in 1866, was obstructed by a fence shortly after the alley was laid out and surveyed, and thereafter was not opened or used as an alley westward from said 90 feet. There is no proof that this 90 feet was laid out as a *cul-de-sac*.

Third. That the 90 feet of said alley was used as an alley during

the years 1866, 1867, 1868, 1869, 1870, and 1871 up to the date of the obstruction thereof by defendant. The principal use to which the alley was put was for taking in wood & hay and for the ingress and egress of the cows of the adjacent occupants. But the alley was a thoroughfare so far as a street with an outlet at one end and closed at the other can become such.

Fourth. That the said plaintiffs and their predecessors in interest have erected valuable improvements upon their lots adjacent
15 to said 90 feet of alley, and had and held a right of property therein at the time of the entry of said town site by said probate judge, and the same was used as an alley by all the inhabitants of said town residing in the vicinity thereof.

Fifth. That the same was an alley at the time of the acquisition of the title of the defendant and his predecessors in interest to the lots owned by him adjacent thereto, and was so designated in his deed to said property, and was acquiesced in and recognized as such by himself and grantors up to the time of his obstruction of the same.

Sixth. That the map of the town, made by direction of the probate judge, as trustee, and presented to the county commissioners, and approved by them under the town site act, did not show that the *locus in quo* was an alley. No action has been taken by the county commissioners to lay out this ground as an alley, highway, or *cul-de-sac*. No appeal or proceedings were ever taken from the survey or map made by direction of the probate judge and filed with the county clerk and recorder and approved by the board of county commissioners. No appeal was ever taken from the
16 decision and action of the probate judge conveying this property to the defendant, or from the survey and map whereby the alley was ignored and the same put down as a lot for sale.

Seventh. That notice to occupants by said probate judge to prove up and enter their lots was duly given.

Eighth. That said defendant, on the 6th day of December, A. D. 1871, made application to enter the property designated in his answer, and, on the — day of ——, 1872, received a deed therefor from the probate judge.

D. S. WADE, *Judge.*

And the court finds as conclusions of law:

1. That at the time of the entry of said town site by the probate judge the said plaintiffs and others, adjacent lot owners on said allley, had a subsisting and valid right therein and to the use thereof as such alley, and that the probate judge entered the same in connection with the said town site in trust, with the usual rights and interests in and to such alley.

2. That being an alley at the time of such entry and used
17 as such his conveyance thereof to defend[ant] is void and inoperative.

3. That, not not being authorized to convey the same, the failure to interpose adverse claim against defendant's application to enter was and is of no consequence.

Jan'y 2, 1879.

D. S. WADE, *Judge.*

And on the 10th day of April, A. D. 1880, the defendant filed in said action his motion for judgment, as follows, to wit:

Motion for Judgment.

Title of cause. Title of court.

Now comes the defendant and moves the court for judgment for the defendant in the above-entitled action upon the findings of fact of the court thereon, and particularly the sixth, seventh, [and] eighth of the findings of fact made by the court.

SANDERS & CULLEN,
For Defendant.

And on the 25th day of May, A. D. 1881, judgment and decree was duly rendered and entered in said action as follows, to wit:

18 *Decree.*

Title of cause. Title of court.

Be it remembered that the above-entitled cause coming on to be heard upon the motion of the respective parties, plaintiffs and defendant, for a judgment and decree upon the findings of the court made and filed therein on the second day of January, A. D. 1879, a jury having heretofore been expressly waived:

It is ordered, adjudged, and decreed that the motion of said plaintiffs upon the findings aforesaid be sustained, and that the said plaintiffs are entitled to have, hold, use, and enjoy their easement and right of way over, in, and upon the said sixteen feet of ground adjacent to and extending along the southerly end and rear of lots Nos. thirty-three, thirty-four, and thirty-five, in block —, in the town of Helena, in the county of Lewis & Clarke, Territory of Montana, said premises being an alley sixteen feet wide and extending the full length in the rear of and adjacent to the lots aforesaid, and being the ground and property embraced in the pleadings and issues herein. And it is further ordered, adjudged,

19 and decreed that said plaintiffs have, hold, use and enjoy the same as an alley and right of way without let or hindrance from said defendant or any one acting by, through, or under him, and that the said fence and obstruction of said defendant on and upon the same is hereby considered, adjudged, and declared to be a nuisance; and in consideration thereof it is also ordered and adjudged that the sheriff of the said county of Lewis & Clarke and Territory of Montana be, and he is hereby, authorized and commanded to tear down and remove the said fence and obstruction upon the said piece of ground so declared a way and alley as aforesaid, so as that the same be made available to its full extent for the free and unmolested use, occupation, and enjoyment of said plaintiffs as such way and alley; that said defendant be, and he is hereby, enjoined and restrained from in any manner interfering with or molesting said sheriff or any one acting by, through, or under him, as his under-sheriff or deputy, in so removing said fence or obstruc-

tions and opening and clearing said way or alley as aforesaid.
20 It is also further ordered, adjudged, and decreed that said defendant, his agents and attorneys, hands and employés, and all persons whomsoever acting by, through, or under him or them be, and they are hereby, forever & perpetually enjoined and restrained from hereafter erecting or constructing, or causing to be erected or constructed, any fence or obstruction upon the said way or alley, or in any way or manner interfering with or preventing said plaintiffs in the free and full use and enjoyment of the same as such way or alley; and it is also further ordered and adjudged that said plaintiffs have and recover of said defendant their disbursements and the costs herein, taxed at —— dollars, as well as the proper and necessary costs and expenses incurred in the execution hereof.

Passed & signed the 25th day of May, A. D. 1881.

DECIUS S. WADE,
Judge 3rd Judicial District Court, Montana Territory.

Exception.

And the said motion of defendant for judgment on the
21 finding of the court herein coming on to be heard, the court overruled the said motion, and thereupon rendered judgment and decree in favor of the plaintiffs in said action & against defendant. To the order of the court overruling defendant's said motion for judgment, and to the rendition and entry of judgment and decree for the plaintiffs herein, the said defendant then and there and at the time duly excepted.

And on the 1st day of January, 1879, the court filed herein its opinion in writing, of which the following is a copy, to wit:

Decision.

Title of cause. Title of court.

The testimony shows that prior to January, 1869, to wit, some time in the summer of 1865, Scott's addition to the town of Helena was surveyed and laid off into blocks and lots bounded by streets and alleys. This survey, though not official, was consented to by the owners, who generally assisted in making it, and
22 the streets and alleys thus established were recognized and used as such, and the lots were bought, sold, and conveyed by the boundaries thus established. This old survey established an alley 16 feet in width in the rear of the lots now owned by the plaintiffs, commencing on Rodney street and extending westward through the block to the next street, and the testimony shows that, opening on Rodney street, and extending westward 90 feet along the rear of the three lots fronting on Broadway now owned by plaintiffs, and along the northerly side of the lot now owned by the defendant, this alley or space of ground was fenced, maintained, and used as an alley for more than three years prior to the time when the town availed itself of the town-site act; and, further, that the

owners of these adjacent lots in their deeds conveying the same mentioned and described this space of ground as an alley.

Westward beyond this 90 feet the alley as designated and laid out by the old survey was not maintained, but it does not distinctly appear why or upon what conditions the same was obstructed
23 and not used as an alley. Under this condition and situation of affairs the people of the town availed themselves of the town site act. The ground occupied by the town was conveyed to the probate judge in trust for the several use and benefit of the occupants according to their respective interests, but in the survey that ensued wherein the blocks, streets, and alleys of the town were designated the ground in question was not laid down or described on the plat of the town site as a street or alley. Thereupon the defendant, claiming that this ground became thereby subject to location and entry filed upon the same, received a deed from the probate judge and inclosed the same with a fence as his private property.

What are the rights of the parties arising upon these facts?

Prior to the passage by Congress of the town-site act the establishment of a law authorizing the people of a town located upon the public domain to acquire title to their lots became a necessity. Helena was one of the towns thus located. It had for years been divided into blocks, lots, streets, and alleys, with the consent
24 and for the use and benefit of the people of the town who had constructed their houses and made improvements accordingly. The streets and alleys bounded the lots, and the lots were conveyed by these boundaries. The purpose of the town-site act was not to disturb the people in the enjoyment of any of their property or rights in a town thus located, but to enable them to acquire a complete title to the property they occupied and really owned. With this view the Government conveyed to the probate judge the ground upon which the town of Helena is situated in trust to be by him reconveyed to the occupants according to their respective rights and interests. It probably will not be denied that the occupants of lots under the old survey acquired certain easements, rights, and interests in & to the streets and alleys which had been opened and used as such adjacent to the lots so occupied. The act of Congress authorizing a conveyance to the probate judge in trust for the use and benefit of the occupant- of the lots according to their respective interests is a grant, and carries with it everything necessary and
25 requisite to make it operative. In order thus to convey to the occupant their rights and easements in the streets and alleys — must be protected. Therefore the grant of the lots by Congress to the occupants, according to their respective interests, necessarily recognized the existence of the streets and alleys as then laid out and used, and such grant was a dedication of the same to the public use.

The grant of the lots to the occupants, according to their respective interests, necessarily carries with it a dedication of the streets and alleys as they then existed to the uses and purposes for which they were then used; otherwise, the respective interests and rights of the occupants could not be designated, defined, and preserved as the

tions and opening and clearing said way or alley as aforesaid.
20 It is also further ordered, adjudged, and decreed that said defendant, his agents and attorneys, hands and employés, and all persons whomsoever acting by, through, or under him or them be, and they are hereby, forever & perpetually enjoined and restrained from hereafter erecting or constructing, or causing to be erected or constructed, any fence or obstruction upon the said way or alley, or in any way or manner interfering with or preventing said plaintiffs in the free and full use and enjoyment of the same as such way or alley; and it is also further ordered and adjudged that said plaintiffs have and recover of said defendant their disbursements and the costs herein, taxed at —— dollars, as well as the proper and necessary costs and expenses incurred in the execution hereof.

Passed & signed the 25th day of May, A. D. 1881.

DECIUS S. WADE,
Judge 3rd Judicial District Court, Montana Territory.

Exception.

And the said motion of defendant for judgment on the
21 finding of the court herein coming on to be heard, the court overruled the said motion, and thereupon rendered judgment and decree in favor of the plaintiffs in said action & against defendant. To the order of the court overruling defendant's said motion for judgment, and to the rendition and entry of judgment and decree for the plaintiffs herein, the said defendant then and there and at the time duly excepted.

And on the 1st day of January, 1879, the court filed herein its opinion in writing, of which the following is a copy, to wit:

Decision.

Title of cause. Title of court.

The testimony shows that prior to January, 1869, to wit, some time in the summer of 1865, Scott's addition to the town of Helena was surveyed and laid off into blocks and lots bounded by streets and alleys. This survey, though not official, was consented to by the owners, who generally assisted in making it, and
22 the streets and alleys thus established were recognized and used as such, and the lots were bought, sold, and conveyed by the boundaries thus established. This old survey established an alley 16 feet in width in the rear of the lots now owned by the plaintiffs, commencing on Rodney street and extending westward through the block to the next street, and the testimony shows that, opening on Rodney street, and extending westward 90 feet along the rear of the three lots fronting on Broadway now owned by plaintiffs, and along the northerly side of the lot now owned by the defendant, this alley or space of ground was fenced, maintained, and used as an alley for more than three years prior to the time when the town availed itself of the town-site act; and, further, that the

owners of these adjacent lots in their deeds conveying the same mentioned and described this space of ground as an alley.

Westward beyond this 90 feet the alley as designated and laid out by the old survey was not maintained, but it does not distinctly appear why or upon what conditions the same was obstructed
23 and not used as an alley. Under this condition and situation of affairs the people of the town availed themselves of the town site act. The ground occupied by the town was conveyed to the probate judge in trust for the several use and benefit of the occupants according to their respective interests, but in the survey that ensued wherein the blocks, streets, and alleys of the town were designated the ground in question was not laid down or described on the plat of the town site as a street or alley. Thereupon the defendant, claiming that this ground became thereby subject to location and entry filed upon the same, received a deed from the probate judge and inclosed the same with a fence as his private property.

What are the rights of the parties arising upon these facts?

Prior to the passage by Congress of the town-site act the establishment of a law authorizing the people of a town located upon the public domain to acquire title to their lots became a necessity. Helena was one of the towns thus located. It had for years been divided into blocks, lots, streets, and alleys, with the consent
24 and for the use and benefit of the people of the town who had constructed their houses and made improvements accordingly. The streets and alleys bounded the lots, and the lots were conveyed by these boundaries. The purpose of the town-site act was not to disturb the people in the enjoyment of any of their property or rights in a town thus located, but to enable them to acquire a complete title to the property they occupied and really owned. With this view the Government conveyed to the probate judge the ground upon which the town of Helena is situated in trust to be by him reconveyed to the occupants according to their respective rights and interests. It probably will not be denied that the occupants of lots under the old survey acquired certain easements, rights, and interests in & to the streets and alleys which had been opened and used as such adjacent to the lots so occupied. The act of Congress authorizing a conveyance to the probate judge in trust for the use and benefit of the occupant- of the lots according to their respective interests is a grant, and carries with it everything necessary and
25 requisite to make it operative. In order thus to convey to the occupant their rights and easements in the streets and alleys — must be protected. Therefore the grant of the lots by Congress to the occupants, according to their respective interests, necessarily recognized the existence of the streets and alleys as then laid out and used, and such grant was a dedication of the same to the public use.

The grant of the lots to the occupants, according to their respective interests, necessarily carries with it a dedication of the streets and alleys as they then existed to the uses and purposes for which they were then used; otherwise, the respective interests and rights of the occupants could not be designated, defined, and preserved as the

act of Congress requires. The act of the territorial Legislature, in order to protect the rights and interests of the occupants of lots, and to carry out and put in operation the act of Congress, provides that the probate judge or corporate authorities, after the entry of the town site, unless a survey and accurate plat thereof has been previously made, shall cause *to* the same to be surveyed and a
26 plat thereof made, which plat and survey shall conform as nearly as may be to the existing rights, interests, and claims of the occupants thereof. If a survey had been previously made and the town accurately laid out into blocks, streets, and alleys, and a plat thereof made, then no other or further survey need be had by the authorities. If no survey had been previously made, then the probate judge or corporate authorities were required to make a survey and plat which should conform as nearly as possible to the blocks, streets, and alleys as they existed before such survey. In either case from whence came the authority of the Legislature thus to designate the streets and alleys of the town? From no other source than the act of Congress, which by granting the lots to the occupants, according to their respective interests, thereby dedicated the streets and alleys as they then existed to the use of the public; otherwise, the title to all the streets and alleys in the town still remains in the Government or probate judge, and are subject to be filed upon and fenced up at any time as the private property of private individuals. The propriety and
27 reasonableness of this interpretation of the statute is apparent. Suppose the probate judge, after the entry of the town site, and in making a survey and plat thereof, purposely caused the plat to fail to designate one of the principal streets in the town, which for years had been used as such, would such failure defeat and destroy the rights of parties who had spent large sums of money in the construction of business and dwelling houses thereon to have such street kept open or maintained as such? Or would such failure subject said street to location, by which the same would become private property, and whereby the property of those who had previously built upon the street would be destroyed? I think not. The survey and plat must conform as nearly as possible to the existing streets and alleys. If it does not the streets and alleys are not thereby destroyed, but the plat is so far illegal. The probate judge has no power whatever to change the plan of the town. He cannot designate a street or alley on the plat and thereby make it such if it did not exist before. Private property is not in that man-
28 ner condemned to public uses. He cannot fail to designate a street or alley that did exist before his survey and plat, and thereby destroy the existence of such street or alley. The latter case is as much beyond his authority as the former, and in either case his acts would have been simply void.

Suppose the probate judge had failed to have designated upon the official plat the street in front of the three lots on Broadway instead of having so failed as to the alley in their rear, would such failure have converted such street into ground subject to be filed upon and conveyed as the private property of a private individual? Could

any private right be based upon such a departure from the statute, which requires the official plat to conform in its designation of streets and alleys as near as may be to existing rights—that is, as near as may be to the streets and alleys as they had existed before the official survey? I think not. To hold that the mere fact that the official plat failing to designate a street or alley thereby converts the same into ground subject to be filed
29 upon and sold would place the power in the probate judge by his caprice or his fraud to entirely change the plan of the town and to sell out every street on it. This was a power expressly denied the probate judge in requiring the official plat to conform to existing rights. It follows, therefore, that the primary requisite of a survey under the direction of the probate judge and the one which alone gives to it legality is that it conform to existing rights; that it establishes streets and alleys where by user and common consent they had been already established, and that it preserve to the occupants of lots all the property and rights they had acquired therein. Such a survey as this is the only one the probate judge is authorized to have made. A survey and plat that appropriates private property to public uses by converting the same into a street or alley, or that destroys the existence of a street or alley which had previously been established, are alike unauthorized and illegal, so far as such street or alley is concerned. The probate judge must spread his survey and plat upon the streets and alleys as they existed before
30 the survey as nearly as may be, and, if other streets and alleys are to be established through private property, such property must be appropriated and condemned in the usual manner.

It only remains to inquire whether a street or alley, with an outlet at one end and closed at the other, is, in contemplation of law, a public street or alley. The authority of the case of the People *vs.* Kingruon, 24 New York, 559, and others that might be cited must be held to determine that such a street or alley is a public thoroughfare, and entitled to protection as such.

The testimony shows that the plaintiffs, Parchen, bought his lots and built his house thereon with express reference to the existence of this alley in their rear, and under the proofs and the law we believe him entitled to have this space of ground, 90 feet long by 16 feet wide, kept and maintained as an alley.

Findings and judgment in favor of plaintiffs.

Exceptions by defendant.

D. S. WADE, *Judge*.

Jan'y 1, 1879.

31 And on the 15th day of December, A. D. 1881, the said appellant filed his notice of appeal in said action in words & figures following to wit:

Notice of Appeal.

Title of cause. Title of court.

You will please take notice that the defendant in the above en-

titled action hereby appeals to the supreme court of the Territory from the decree and judgment therein made & entered in the said district court on the twenty-fifth day of May, A. D. 1881, in favor of the plaintiffs in said action and against said defendant & from the whole thereof.

Dated this 15th day of December, A. D. 1881.

Yours, &c.,

SANDERS & CULLEN,
Att'ys for Defendant.

To the clerk of said district court and Messrs. Chumasero & Chadwick & Toole & Toole, attorneys for plaintiff.

Endorsed: "Received a copy of the within notice of appeal this 15th day of December, A. D. 1881." Chumasero & Chadwick, of counsel for plaintiffs. Alex. H. Boattie, clerk.

32 And on the 17th day of December, A. D. 1881, the said appellant filed herein his undertaking on appeal, as follows, viz:

Undertaking on Appeal.

Title of cause. Title of court.

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of the Territory of Montana from a decree made and entered in said action in the said district court in favor of the plaintiffs and against said defendant on the 25th day of May, A. D. 1881, for the abatement of the alleged nuisance and the cost of suit: Now, therefore, in consideration of the premises and of such appeal we, the undersigned, John T. Murphy and Abram Sands, of the county of Lewis and Clarke and Territory of Montana, do hereby jointly and severally undertake and promise, on the part of said appellant, that the said appellant will pay all damages and costs which may be awarded against the said defendant and appellant on the appeal or on a dismissal thereof, not exceeding the amount of three hundred dollars, in which sum we acknowledge ourselves jointly and severally bound. And whereas the appellant is
33 desirous of staying the execution of the said decree so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake & promise, and do acknowledge ourselves further jointly and severally bound in the further sum of three hundred dollars, that if the said decree appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed if affirmed only in part, and all damages & costs which shall be awarded against the appellant on the appeal; and that during the possession of the alley or premises mentioned in plaintiff's amended complaint and in the decree herein by the appellant, the appellant will not commit or suffer to be committed any waste thereon; and if the said decree be affirmed or the appeal dismissed the appellant

will pay the value of the use and occupation of the property so decreed to be delivered from the time of the appeal until the delivery of the possession thereof, not exceeding said sum of three hundred dollars, which said sum has been fixed by the said district court as the amount necessary to stay the execution of said decree.

34 And, whereas the appellant is desirous of staying the execution of the said decree so appealed from as to the costs mentioned therein, we do further, in consideration thereof and of the premises, jointly & severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of nine hundred and fifty dollars (being double the amount named in the said decree for said costs), that if the said decree appealed from or any part thereof in that respect be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed if affirmed only in part, not exceeding said sum of nine hundred & fifty dollars, in which sum we do further acknowledge ourselves jointly & severally bound.

Witness our signatures this 17th day of December, A. D. 1881.

JOHN T. MURPHY.
A. SANDS.

(Here follows justification of sureties.)

35 In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

SIDNEY M. HALL and HENRY M. PARCHEN, Respondent,

vs.

SHIRLEY C. ASHBY, Appellant.

I, A. H. Beattie, clerk of said court, do hereby certify that the foregoing thirty-four pages, numbered from 1 to 34, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled action in said district court as the same remain on file and of record in my office.

In witnesss whereof I have hereunto set my hand and affixed the seal of said court this 15th day of December, A. D. 1881.

[Seal of the Dist. Court.]

A. H. BEATTIE, *Clerk.*

36 In the Supreme Court of Montana Territory. August Term, 1882.

SIDNEY M. HALL and HENRY M. PARCHEN, Respondents,

vs.

SHIRLEY C. ASHBY, Appellant.

Be it remembered that in the present term of August, A. D. 1882, the above-entitled cause was brought into the supreme court of Montana Territory by virtue of an appeal, by filing herein the transcript of the record of the district court in said cause.

And said cause coming on to be heard before said supreme court on said transcript of record the same was argued by counsel.

Whereupon the court took the same under advisement to the next term, to wit, the January term, A. D. 1883, of said court.

And afterwards, at the January term, A. D. 1883, of said supreme court, said cause came on before the court for decision and judgment on appeal. Whereupon the court delivered its opinion herein as follows:

37 In the Supreme Court of Montana Territory. January Term, 1883.

SIDNEY M. HALL and HENRY M. PARCHEN, Plaintiffs & Respondents,

vs.

SHIRLEY C. ASHBY, Defendant & Appellant.

Appeal from 3rd District — Lewis and Clarke County.

Opinion of court, by Wade, chief justice.

This controversy arose over a strip of land 16 feet wide on Rodney street, in the town of Helena, and extending westerly 90 feet in the rear of lots owned by plaintiffs, which they claim is an alley, and prosecute this action to have the same so declared and to perpetually enjoin the defendant from obstructing the same. The defendant denies that the ground is, or that it ought to be declared, an alley, and claims to own the same by virtue of a deed from the probate judge. On the trial the court found the following facts and conclusions of law:

38 First. That Scott's addition to the town of Helena was laid out, surveyed, and platted in the spring of the year 1866 with sixteen-feet alleys through the centre of the blocks thereof, in an easterly and westerly direction, in which was comprised the 90 feet of alley in controversy, the title to the ground of which, and as to all the ground occupied by the town, and the streets and alleys thereof, being at the time, and until the entry of the town site in 1869, in the Government of the United States.

Second. That the original occupants of the lots adjoining that portion of the alley involved in this action respected and recognized said alley, as did their grantees and successors in interest, up to and at the date of the entry of said town site by the probate judge of said county, and that the respective parties hereto accepted and received deeds to their lots adjacent thereto bounded by said alley, and in locating, fencing, and occupying their lots respected, marked, and bounded said alley; and at the western boundary of the ground in controversy and at the eastern boundary of the Watson

39 lot said alley, as surveyed and platted in 1866, was obstructed by a fence shortly after the alley was laid out and surveyed, and thereafter was not opened or used as an alley westward from said 90 feet. There is no proof that this 90 feet was laid out as a *cul-de-sac*.

Third. That the 90 feet of said alley was used as an alley during the years 1866, 1867, 1868, 1869, 1874, and 1871, up to the date of the obstruction thereof by defendant. The principle use as to which the alley was put was for taking in wood and hay and for ingress and egress of the cows of the adjacent occupants. But the alley was a thoroughfare so far as a street with an outlet at one end and closed at the other can become such.

Fourth. That the said plaintiffs and their predecessors in interest have erected valuable improvements upon their lots adjacent to said 90 feet of alley, and had and held a right of property therein at the time of the entry of said town site by said probate judge, and the same was used as an alley by all the inhabitants of said town residing in the vicinity thereof.

40 Fifth. That the same was an alley at the time of the acquisition of the title of the defendant and his predecessors in interest to the lots owned by him adjacent thereto, and was so designated in his deed to said property, and was acquiesced and recognized in as such by himself and grantors up to the time of his obstruction of the same.

Sixth. That the map of the town, made by direction of the probate judge as trustee and presented to the county commissioners and approved by them under the town site act, did not show that the *locus in quo* was an alley. No action of the county commissioners has been taken to lay out this ground as an alley, highway, or *cul-de-sac*. No appeal or proceedings were ever taken from the survey or map made by direction of the probate judge and filed with the county clerk and recorder and approved by the board of county commissioners; no appeal was ever taken from the decision and action of the probate judge conveying this property to the defendant, or from the survey and map whereby the alley was ignored

41 and the same put down as a lot for sale.

Seventh. That notice to occupants by said probate judge to prove up and enter their lots was duly given.

Eighth. That said defendant, on the 6th day of December, A. D. 1871, made application to enter the property designated in his answer, and on the —— day of ——, 1872, received a deed therefor from the probate judge.

And as conclusions of law the court found:

First. That at the time of the entry of said town site by the probate judge the said plaintiffs and other adjacent lot-owners on said alley had a subsisting and valid right therein and to the use thereof as such alley, and the probate judge entered the same in connection with said town site in trust, with the usual rights and interests in and to such alley.

Second. That, being an alley at the time of such entry and used as such, his conveyance thereof to defendant is void and inoperative.

Third. That not being authorized to convey the same, the failure to interpose adverse claim against defendant's application to

42 enter was and is of no consequence.

The act of Congress concerning the reservation and sale of

town sites on the public lands, Revised Statutes U. S., sec. 2387, in substance provides that whenever any portion of the public lands have been or may be settled upon and occupied as a town site it shall be lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of the lots in such town, to be conducted under such regulations as may be prescribed by the Legislature of the State or Territory in which the same may be situated.

Sec. 2391 Rev. Stat. provides that any act of the trustees not made in conformity to the regulations alluded to in section 2387 shall be void.

43 The statute of the Territory in aid of this trust and to carry the same into effect, in substance, provides that the judge of the probate court shall, within three months from and after the entry of the town site, unless a survey and an accurate map or plat thereof has been previously made, cause the same to be surveyed and a plat thereof made, which survey & plat shall conform as near as may be to the existing rights, interests, and claims of the occupants thereof, which survey and plat shall be submitted to and accepted by the board of county commissioners in the county where the town is situated; that the town site shall be surveyed into blocks, lots, streets, and alleys; that the plat of such town shall be filed in the office of the county recorder, and thereafter the streets and alleys designated in such plat shall remain dedicated to the public use forever.

Rev. Stats., 1207–1208.

1. It appears from the findings of the court that in the spring of 1866 the town of Helena was surveyed and platted, and that
44 the ground in question was by this survey and plat designated as an alley, and was so used by the public for and during the years 1866, 1867, 1868, 1869, 1870, and 1871, up to the date of the obstruction of the same by the defendant; that the original occupants of the lots adjacent to said alley respected and recognized the same as an alley, as did their grantees and successors in interest up to the date of entry of the town site by the probate judge; that both the plaintiffs and the defendant accepted and received deeds to their lots adjacent thereto and bounded by said alley, and that in locating, fencing, and occupying their lots respected, marked, and numbered, bounded — said alley, not only the parties hereto and their predecessors in interest but the general public recognized, used, accepted, and respected said ground as an alley and had for all the three years next prior to, and did at the time of the entry of the town site by the probate judge.

These findings were authorized by the allegations of the complaint, which avers that the plaintiffs had been in the peace-
45 able and quiet possession, use, and enjoyment of the ground in controversy as an alley, easement, and right of way, and

that the same was so used, set apart, and enjoyed by the common consent of adjoining claimants, and, by general usage, prior to the survey and entry of what is known as the Helena town site.

Prior to that time all the streets and alleys of the town could only have been used as such by common consent and general usage. Prior to that time the title to all the land covered by or included within the town, as well the streets and alleys as the lots, was in the Government, and the survey and plat of 1866, as to streets and alleys, derived all its vitality from general usage and common consent. Technically, the occupation of the lots and the use of the streets and alleys was a trespass, and the purpose of the act of Congress providing for the reservation and sale of town sites on the public domain was enacted to enable the occupants of lots so situated to become the owners of the land they so occupied, and so
46 the act provided for the entry at the proper land office of the land so occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests. Disposing of the lands covered by a town to the occupants, according to their several rights and interests, could not be done, except that the streets and alleys there in public use were reserved to the public.

The trustee was to dispose of the lots under such regulations as the local legislature might prescribe, and any departure from such regulations rendered his acts void. These regulations could not enlarge or diminish the rights or interests of the occupants of the lots. And so our Legislature provided that the survey and plat of the town site should conform as near as might be to the existing rights, interests, and claims of the occupants thereof. The lots were to be surveyed and the streets and alleys as they existed prior to the entry were to be respected and recognized, for in no other manner could the occupants obtain title to their lots according to their several rights and interests. The plat and survey of the probate judge must conform to the old survey, by which the occupants
47 had held and occupied their lots prior to the entry of the town site; otherwise this plat and survey is so far void. The provisions of the territorial statute dedicating the streets and alleys as designated on the plat and survey of the probate judge to the public use forever is of no consequence, unless such survey and plat conform to the rights of the occupants prior to such survey. If, prior to the survey of the probate judge, there had been an earlier survey and plat designating lots, streets, & alleys, and the occupants had by general usage and common consent accepted such survey and plat, and had bought and sold their lots accordingly, and the streets and alleys thereof had been used as such by the public with common consent, then such streets and alleys remained streets and alleys after the survey and entry of the probate judge, though not so designated on his plat and survey.

The streets and alleys did not so belong to the Territory that its Legislature could dedicate them to the public use forever. Such dedication can only be made by the owner of the property

dedicated. The Legislature was only authorized to regulate the sale of the lots.

The act of Congress providing the means whereby the lots might be conveyed to the occupants according to their several rights and interests in a town situate on the public domain which, before such enactment, had been platted and surveyed into blocks, lots, streets, and alleys which were recognized and used as such by the public, and by which the occupants, in the conveyance of their possessory interests or titles, bounded and described their lots, was a dedication of the streets and alleys, as they then existed, to the public use, and the act of the Legislature, either enlarging or diminishing such dedication, thereby enlarging or diminishing the rights and interests of the occupants to their lots, was not authorized and did not confer any rights. If it did, then private property might be taken for public use by means of a mere survey and plat by a probate judge.

The occupants of lots under the old survey acquired certain easements, rights, and interests in and to the streets and alleys which had been opened and used as such adjacent to the lots so occupied. The trust in the probate judge attached to these rights and easements the same as it did to the lots themselves. He became the trustee of the occupants for all their interest or right in or pertaining to the lots. If before the survey and entry by the probate judge an occupant had acquired a right or interest in a public street or alley, it became as much the duty of the probate judge in the execution of his trust to protect such right or interest as to protect the occupant's interest in the lot itself.

The act of Congress authorizing a conveyance to the probate judge, in trust for the use and benefit of the occupants of the lots according to their respective rights and interests, is a grant, and carries with it everything necessary and requisite to make it operative. In order thus to convey to the occupants — their rights and easements in the streets and alleys must be protected. Therefore, the grant of the lots by Congress to the occupants according to their respective interests necessarily recognized the existence of the streets and alleys as then laid out and used, and such grant was a dedication of the same to the public use.

The right of occupants accrued before the entry of the town site by the probate judge, and the mere fact that his plat and survey failed to designate a street or alley as it existed before his entry and survey does not thereby destroy such street or alley and change the ground occupied by the same into a lot that can be sold. And so, for the same reason, if his plat and survey had designated ground theretofore occupied as a lot, as an alley, or a street, such designation would not in any manner affect the right of the occupant to his lot. All the powers of the probate judge as trustee are exhausted when he has conveyed to the occupants their lots according to their several rights and interests.

This case was once before this court on different pleadings and issues, and with no findings of fact, and it was then decided that an alley could not be formed or declared by a mere description in

51 a deed from the trustee, and this for the reason that the trustee had no authority to alter or change the streets or alleys as they existed before the entry of the town site, and that if he did his act was void.

2 Mont., 489.

But that decision does not affect this case or the rights of the parties wherein the issue was as to the existence of an alley before the entry of the town site, and where there are findings of fact that such an alley did exist and was used as such by the public prior to that time.

The judgment is affirmed with costs.

D. S. WADE,
Chief Justice.
E. J. CONGER,
Asso. Justice.

Filed Jan'y 30, 1883.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was entered in said cause in conformity with said opinion in words & figures following, viz:

52 *Judgment on Appeal.*

In the Supreme Court of Montana Territory. August Term, 1882. January Term, 1883.

SIDNEY M. HALL and HENRY M. PARCHEN, Plaintiffs & Respondents,
vs.
SHIRLEY C. ASHBY, Defendant & Appellant.

Whereas in the present term of August, in the year of our Lord one thousand eight hundred and eighty-two, the above-entitled cause was brought into the supreme court of the Territory of Montana by virtue of an appeal from the judgment of the court below entered therein on the 25th day of May, A. D. 1881, and the transcript of the record of the district court in said cause was filed and the cause docketed; and the said cause coming on to be heard before said supreme court on the said transcript of record the same was argued by counsel: Thereupon the court took the same under advisement until the next term of the court, to wit, the January term, 1883.

53 And in the present term of January, A. D. 1883, said cause came regularly on before the court for decision and judgment on appeal. The court delivered its opinion in writing, wherein it is here ordered, adjudged, and decreed that the judgment and decree of the court below entered in said cause aforesaid be, and the same is hereby, affirmed with costs.

And it is hereby further ordered that said plaintiffs and respondents, Sidney M. Hall and Henry M. Parchen, recover against said defendant and appellant, Shirley C. Ashby, —— dollars for their costs in this behalf expended and have execution therefor.

30th January, 1883.

And on the 7th day of February, 1883, said cause coming on to be heard before the court on appellant's motion for a rehearing herein, on consideration it is ordered by the court that said motion be overruled.

And on the same day, on the application of the appellant,
54 it is ordered by the court that the said appellant be, and hereby is, allowed an appeal from the judgment and order of this court in said cause to the Supreme Court of the United States, and that the bond on such appeal be fixed in the sum of five hundred dollars, with sufficient sureties, to be approved by one of the justices of this court, and that upon the execution, approval, and filing of such bond or undertaking a supersedeas be granted herein.

And on the 8th day of March, A. D. 1883, said appellant, by his counsel, filed herein his petition for appeal, of which the following is a copy, viz:

Petition.

In the Supreme Court of Montana Territory. January Term, A. D. 1883. In Chancery.

SIDNEY M. HALL and HENRY M. PARCHEN, Appellees,
vs.
SHIRLEY C. ASHBY, Appellant.

55 To the Honorable Decius S. Wade, chief justice of Montana Territory:

The defendant and appellant in the above-entitled cause, to wit, Shirley C. Ashby, respectfully shows that this is a suit in chancery for a decree declaring a certain strip or parcel of land in the town of Helena, Montana Territory, particularly described in plaintiffs' complaint herein, to be an alley, easement, or public highway; that at a term of the supreme court of the Territory of Montana, begun on the 2nd day of January, A. D. 1883, a final judgment was rendered in the above cause affirming the judgment and decree of the court below and granting the prayer of plaintiffs' bill, and an order of the court to execute and enforce the said judgment and decree herein; and this petitioner, for an appeal, further states that manifest error hath happened and injustice been done in said final judgment of the supreme court of the Territory of Montana, to the great damage of your petitioner. Wherefore your petitioner prays
56 an appeal from the said judgment and decree herein to the Supreme Court of the United States, as provided by law, and that a citation issue accordingly. Your petitioner now here presents to your honor a good and sufficient bond in the sum of five hundred dollars, in accordance with the rule of the Supreme Court of the United States in such case provided, conditioned as therein

required, and asks that said bond be approved, to operate as a supersedeas.

W. F. SANDERS,
Solicitor for Appellant.

I allow this appeal.
(Signed) D. S. WADE,
Chief Justice.

And afterwards, to wit, on the 12th day of March, A. D. 1883, the said appellant filed herein his undertaking on appeal pursuant to the order of the court, of which said undertaking, with the endorsements thereon, the following is a copy, viz:

57 Know all men by these presents that we, John T. Murphy and William Hudnall, of Lewis and Clarke county, Montana Territory, are held and firmly bound unto Sidney M. Hall and Henry M. Parchen in the full and just sum of five hundred dollars, to be paid to the said Sidney M. Hall and Henry M. Parchen, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of March, A. D. 1883.

Whereas, lately, at a term of the supreme court for the Territory of Montana, in a suit pending in said court between Sidney M. Hall and Henry M. Parchen, as plaintiffs, and Shirley C. Ashby, as defendant, there was rendered a final judgment and decree in favor of the plaintiffs and against the said defendant, as will fully appear from the transcript of the record in said case, and the said defendant having obtained an order allowing an appeal upon a pe-
58 tition filed therefor, and filed a copy thereof in the clerk's office of the said supreme court for the Territory of Montana to reverse the judgment and decree in the aforesaid suit, and a citation directed to the said plaintiffs citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next: Now the condition of the above obligation is such that if the said defendant shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, and shall pay such sum as may be recovered for obstruction, detention, and occupation of the premises in controversy herein, and the costs of the suit, and costs and interest on the appeal, then the above obligation to be void; else to remain in full force and virtue.

JOHN T. MURPHY. [SEAL.]
WILLIAM HUDNALL. [SEAL.]

Sealed & delivered in the presence of—
W. E. CULLEN.

TERRITORY OF MONTANA, } ss:
Lewis & Clarke County, }

59 We, John T. Murphy and William Hudnall, both being duly sworn, depose and say, and each for himself says, that he is a citizen of the United States and of the Territory of Montana; that he is worth the sum of five hundred dollars beyond the amount of his debts and that he has property liable to execution equal to said sum.

JOHN T. MURPHY,
WILLIAM HUDNALL.

Subscribed and sworn to before me this 12th day of March, A. D. 1883.

W. E. CULLEN,
Notary Public, M. T.

[Endorsed:] Filed & approved by D. S. Wade, chief justice, March 12, 1883. I. R. Alden, clerk.

And on the same day, to wit, the 12th day of March, A. D. 1883, said appellant filed in this cause his citation, of which, with the endorsements thereon, the following is a copy, viz:

60 UNITED STATES OF AMERICA, ss:

To Henry M. Parchen, Chumasero and Chadwick, and E. W. & J. K. Toole, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next, pursuant to a petition for and an allowance of an appeal filed in the clerk's office of the supreme court of the Territory of Montana, wherein Shirley C. Ashby is appellant and Henry M. Parchen *et al.* are appellees, to show cause, if any there be, why a certain final judgment and decree in favor of said appelles, as in the said petition for an appeal mentioned, should not be corrected and reversed, and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of Montana, this 8th day of March, A. D. 1883.

D. S. WADE,
Chief Justice.

61 Endorsement: Service of the within citation made this 12th day of March, A. D. 1883. Chumasero & Chadwick, E. W. & J. K. Toole, att'ys for def't in error. Filed M'ch 12, 1883. I. R. Alden, clerk.

62 In the Supreme Court of Montana Territory.

SIDNEY M. HALL and HENRY M. PARCHEN, Appellees,

vs.

SHIRLEY C. ASHBY, Appellant.

I, I. R. Alden, clerk of the supreme court of Montana Territory,

do hereby certify that the foregoing sixty-one pages, numbered from 1 to 61, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in said cause above named, in said supreme court, as the same appear on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 8th day of May, A. D. 1883.

[Seal Supreme Court Montana Territory.]

I. R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No.276. Shirley C. Ashby, appellant, *vs.* Sidney M. Hall and Henry M. Parchen. Filed 10th September, 1883.

119 B26

In the Supreme Court of the United States.

SHIRLEY C. ASHBY

v.

SIDNEY M. HALL AND HENRY M. PARCHEN.

No. 37.

On Appeal from the Supreme Court of Territory of Montana.

BRIEF FOR APPELLANT.

The defendants in error, the plaintiffs in the court below, in their amended complaint aver that since the 1st day of May, 1865, they, and those under whom they claim had been owners of lots Nos. 33, 34, and 35, in block 28, in Helena City, in Montana Ter., with all the appurtenances, easements, and rights of way thereto belonging; that they had been in possession of said lots and in the use and enjoyment of an alley, easement, and right of way to and from their premises; that said premises so claimed as an alley or easement is sixteen feet wide, and extends along southerly end of said lots to Rodney street; that said right of way is necessary to the use and enjoyment of said lots, and was reserved for such purpose by the probate

judge of the county till about 1st May, 1872, when the defendant (plaintiff in error) wrongfully and unlawfully obstructed the same by a fence, and has continued it ever since.

They pray that defendant may be compelled to remove the fence and be perpetually enjoined from obstructing the said alley in any manner whatever.

The defendant below answered this complaint, and denied it allegations so far as the right of way was claimed. He averred that in the survey of said town-site authorized by law to be made, which was submitted to and accepted by the Board of County Commissioners, the *locus in quo* was not laid out as an alley, but was accepted as a part of the domain of the town liable to entry accordingly, and on 13th March, 1874, he, the said defendant, applied to county judge therefor, and the same was conveyed to him, and he is now the owner and holder of the same.

The court below found the following as the facts in the case :

First. That Scott's addition to the town of Helena was laid out, surveyed, and platted in the spring of the year 1866, with sixteen-feet alleys through the centre of the blocks thereof, in an easterly and westerly direction, in which was comprised the 90 feet of alley in controversy, the title of the ground of which, and as to all the ground occupied by the town and the streets and alleys thereof, being at the time, and until the entry of the town site in 1869, in the Government of the United States.

Second. That the original occupants of the lots adjoining that portion of the alley involved in this action respected and recognized said alley, as did their grantors and successors in interest, up to and at the date of the entry of said town site by the probate judge of said county, and that the respective parties hereto accepted and received deeds to their lots adjacent thereto, bounded by said alley, and in locating, fencing, and occupying their lots respected,

marked, and bounded said alley. At the western boundary of the ground in controversy, and at the eastern boundary of the Watson lot, said alley, as surveyed and platted in 1866, was obstructed by a fence shortly after the alley was laid out and surveyed, and thereafter was not opened or used as an alley westward from said 90 feet. There is no proof that this 90 feet was laid out as a *cul-de-sac*.

Third. That the 90 feet of said alley was used as an alley during the years 1866, 1867, 1868, 1869, 1870, 1871, up to the date of the obstruction thereof by defendant.

The principal use to which the alley was put was for taking in wood and hay, and for the ingress and egress of the cows of the adjacent occupants. But the alley was a thoroughfare so far as a street with an outlet at one end and closed at the other can become such.

Fourth. That the said plaintiffs and their predecessors in interest have erected valuable improvements upon their lots adjacent to said 90 feet of alley, and had and held a right of property therein at the time of entry of said town site by said probate judge, and the same was used as an alley by all the inhabitants of said town residing in the vicinity thereof.

Fifth. That the same was an alley at the time of the acquisition of the title of the defendant and his predecessors in interest to the lots owned by him adjacent thereto, and was so designated in his deed to the said property, and was acquiesced in and recognized as such by himself and his grantors up to the time of his obstruction of the same.

Sixth. That the map of the town, made by directions of the probate judge as trustee, and presented to the county commissioners, and approved by them under town-site act, did not show that the (*locus in quo*) was an alley. No action has been taken by the county commissioners to lay out this ground as an alley, highway, or *cul-de-sac*. No appeal or proceedings were ever taken from the survey or map made by directions of the probate judge and filed with the county clerk and recorder and approved by the board of county commissioners. No appeal was ever taken from the decision and action of the probate judge conveying this property to the defendant,

or from the survey and map whereby the alley was ignored and the same put down as a lot for sale.

Seventh. That notice to occupants by said probate judge to prove up and enter their lots was duly given.

Eighth. That said defendant, on the 6th day of December, A. D. 1871, made application to enter the property designated in his answer, and on the — day of ——, 1872, received a deed thereof from the probate judge.

THE LAWS APPLICABLE TO THE CASE.

The law of Congress approved March 2d, 1867, found in U. S. Statutes-at-Large, vol. 14, pages 541, 542, which finds its place in the Revised Statutes as § 2387, provides, "Whenever any portion of the public lands have been, or may be, settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated." § 2391. "Any act of the trustee not made in conformity to the regulations alluded to in section 2387 shall be void."

By this act of Congress the mode and manner of disposing of the lands embraced within a town-site, and the execution of the trusts imposed on the corporate authorities of such town, or in the absence of an incorporation on

the county judge, are to be prescribed by the Territory's Legislature.

Congress delegated this duty to the corporate authorities, or the county judge, under such regulations as may be prescribed by the Legislature.

It will be borne in mind that up to the entry at the land-office by the corporate authorities, or the county judge, the title to the land was in the United States, and no one had acquired any title to these lands until the same was perfected under the laws of the Territory passed in pursuance of § 2387.

The laws of the Territory of Montana, passed in pursuance of § 2387, are found in Revised Statutes of Montana, pages 664, 665, and 666, under the head of Town-Sites.

The sections which bear on this are the following:

SEC. 1205 provides that whenever the citizens of any town located upon public lands of the United States shall desire to obtain title to the town-site, the corporate authorities of such town, or if unincorporated, the judge of probate court of county, whenever such desire is certified by petition of the majority of the resident property holders, shall enter the land at proper land office according to act of Congress approved 2d March, 1867, in trust for uses and benefit of the occupants thereof according to their respective interests.

SEC. 1206 gives to such corporate authorities or judge full power to do all acts and things necessary to the entry of said land at proper land office.

SEC. 1207 directs the corporate authorities or judge within three months after such entry, to cause the same to be surveyed and a plat made thereof, which shall conform, as near as may be, to the existing rights, interests, and claims of occupants thereof, unless a survey and accurate plat thereof has been previously made.

SEC. 1208. "Such town site shall be surveyed into blocks, lots, streets, and alleys, but no lot shall exceed in

area 4,200 square feet; and the plat of such town shall be filed in the office of county recorder for the county in which such town is situated, and thereafter the streets and alleys designated in such plat shall remain dedicated to public use for ever."

SEC. 1209. Immediately after survey and plat the corporate authorities or probate judge shall cause a notice to be published for two months of such entry, and requiring every claimant of any town-lot to file a statement of claim within two months after the first publication of the notice.

SEC. 1210 prescribes how claim shall be made and what the statement shall contain.

SEC. 1211 requires claimants to prove their claims within six months after the expiration of notice.

SEC. 1212 limits the number of lots to each claimant.

SEC. 1213 requires corporate authorities or probate judge, when claim shall be proved according to law, and if there is no conflicting claims to make claimants' deeds.

SEC. 1214 fixes fees to corporate authorities or probate judge.

SEC. 1215 provides for hearing and settling a dispute in regard to right to deed to any lot or lots, and for making a deed after ten days from such settling.

SEC. 1216 provides for an appeal to the district court of the county if claimant feels aggrieved by decision.

SEC. 1217 provides for suspending deed while appeal is pending.

SEC. 1218 requires a deposit of $10 when such appeal is taken.

SEC. 1219 provides for raising funds to defray the expenses of entering, surveying, and platting town-site.

SEC. 1220. The residue or lots in possession of the corporate authorities or the probate judge, as the case may be, and unclaimed after the expiration of the sixty days, it shall be the duty of the probate judge or corporate authorities, as the case may be, to post up notices, or cause the same to be done, in at least four public places in the county in which said town-site is located, at least ten days before the sale, that he will offer and sell at public sale, all of or so many as he may think proper of

the lots that may remain unclaimed at the time advertised and offered for sale; not bringing at least the minimum price as set forth in an act, (of which this is amendatory,) shall be subject at any time thereafter to private entry at the minimum price.

It is believed these are all the provisions of law relating to and governing the disposition of lots in the limits of a town-site entered according to Section 2387, United States Revised Statutes.

Under these findings of fact and these provisions of the law, the court below, on 25th May, 1881, entered a final decree that the plaintiffs were entitled to have hold and enjoy their easement over this piece of ground, and that they have, hold, use, and enjoy the same as an alley and right of way without hindrance from defendant, declared the fence erected by defendant to be a nuisance, and directed the sheriff to remove the same. (Record, page 7.)

The court, in its decision of the case, placed its opinion on the fact that the piece of ground in controversy was an alley. (Record, pages 8 and 9.)

Now, do the facts found and the law justify the conclusion that this was an alley?

The title to the whole town-site was in the United States till, under the provisions of § 2387, the county judge entered this as a town-site. Up to that time there was no title of any kind to any of the lots, and no dedication of streets or alleys. It is true that by occupancy the settlers had gained what Section 2387 in its benignancy denominates interests; that is, they had improved these lots, and for that reason Congress chose, as a matter of grace, to consider they had some interest in th[illegible]ots thus improved. It is also true that one Scott, without the least authority of law, had made some sort of survey of the town, by which it was divided into lots, streets, and alleys; and by this survey an alley was

laid down which embraced the land in controversy and much more. That all of this so-called alley was long before action was taken under § 2387 abandoned as an alley, and all but ninety feet was enclosed as part of coterminous lots.

In this condition of affairs the county judge took action under § 2387. He entered the whole land as a town-site. He became the holder thereof, in trust, for the use and benefit of the occupants thereof, according to their respective interests. He was to execute this trust according to the laws of the Territory above quoted. Now, up to this time, the United States had dedicated nothing. The title to lots, streets, and alleys was in the Government, and no title thereto could be set up against the Government except by proceedings under § 2387. Then we must look to such proceedings to see whether this land was made an alley as against the claim of plaintiff-in-error, derived directly from the Government, and for which he paid his money under the provisions of law enacted under power delegated by the Government. § 1207 of Revised Statutes of Montana directs the county judge, within three months after the entry, to cause the same to be surveyed and a plat made thereof, conforming as near as may to the existing rights and claims of occupants, unless a survey and accurate plat thereof had been previously made.

§ 1208 directs the town-site to be surveyed into blocks, lots, streets, and alleys.

Now the county judge was to survey, unless an accurate survey and plat had been made. Who was to judge whether such survey and plat had been made? Who was to pass on its accuracy? The county judge. And his opinion in this was not subject to review. The fact that he did make a survey was a decision that Scott's survey was inaccurate.

In what respects did he decide Scott's survey and plat was inaccurate? The findings only disclose one. Scott's survey had an alley commencing on Rodney street and extending in rear of plaintiff's lots through the block to next street. The county judge saw this was inaccurate, for all but ninety feet of such alley had been occupied, and that part at least was no longer used. He decided that this was no alley, because when he made his survey he did not make an alley of any part of it, but made of the ninety feet a lot to be sold for benefit of town.

The Court says this was in derogation of the rights of plaintiffs below. If it was and they felt aggrieved by it their remedy was given in the territorial law. They first had a right to go before the county commissioners and object to their approval of the survey; but they did not. They still had the right to appeal to the district court to correct this survey and plat, but they allowed the time to expire in which they had this right of appeal.

It is maintained that when this survey and plat made by the county judge was approved by the commissioners, the town-site of Helena existed according to said survey and plat and not otherwise.

§ 1208 provides that after the plat of the town was filed in the office of the recorder, the streets and alleys *designated in such plat* shall remain dedicated to public use forever. This is the only dedication of streets and alleys provided for, and, of course, if this ground in question was not laid down as an alley in the judge's plat, there was and could be no dedication thereof to the public use. But the plaintiffs in the court below had still another remedy when this piece of land was sold and purchased by the plaintiff in error.

§ 1215 provides for hearing and settling a dispute in regard to right to deed to any lot, and for making a deed ten days after right is settled.

§ 1216 provides for an appeal to the district court if claimant feels aggrieved by decision.

The action of county judge was final, when he decided to give deed to plaintiff in error, unless his decision was appealed from and reversed.

The law wisely gives an appeal to persons feeling aggrieved by the action of county judge, but makes his decision binding and final unless appealed from and reversed.

The court below says (page 10:) "Suppose the probate judge had failed to have designated upon the official plat the street in front of the three lots on Broadway, instead of having so failed as to alley in their rear, would such failure have converted such street into ground subject to be filed upon and conveyed as the private property of a private individual?"

The answer to this question of the court is found in the provisions of the Territorial laws. If county judge had closed Broadway street in violation of the rights and interests of any of the inhabitants of Helena, their remedy was plainly given by the law above quoted. They had the right to appear before the commissioners and oppose approval of survey, and if not successful to appeal to district court. If this course was not pursued, they had the right to appear before the county judge if he attempted to convert Broadway into private property by sale and conveyance. If unsuccessful before him, they had the right of appeal to the district court. All the rights and interests of the inhabitants are most carefully guarded by these town-site laws, and it is almost impossible to lose any such right or interest without the grossest neglect on the part of those claiming and entitled to such rights.

It is suggested that the plainest rights of any man in

any State or Territory may be lost by a failure to use the proper means to preserve and defend them.

Where a right is given and a remedy prescribed in the same statute, the remedy is exclusive of every other, and must be followed.

Sedgwick on Stat., 7, and Constitutional Law, 94.
City of Boston *v.* Shaw, 1 Met., 130.
Crosby *v.* Bennett, 7 Met., 17.

Where a new right, or the means of acquiring it, is conferred, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress.

Smith *v.* Lockwood, 13 Barb., 209.
Dudley *v.* Mayhew, 3 Coms., 9.

If the defendants in error have not availed themselves of the remedies provided by law, they have no standing in court.

Territory *v.* Deegan, 3 Montana, 82.

In this case the court says, on page 89, in passing upon the acquisition of rights in this very town of Helena: "The appellant does not attempt to excuse his failure to comply with the town-site act. After the acceptance and filing of the plat, and before the finding of the indictment, a period of six years, the public acquired a right to enjoy the street and alley which have been obstructed by the appellant. Upon the trial the appellant could not plead as a defence that he occupied the premises, or *question the action of the trustee of the town-site*. He had slept upon his rights which he then maintained. The statute established one tribunal to which the appellant was compelled to resort to obtain a valid title to the property in controversy, and the

district court in which this action was tried had no original jurisdiction in these matters. The appellant had no remedy at common law, and the statute pointed out clearly his sole mode of proceeding."

This was an indictment against Deegan for obstructing one of the streets in Helena which the county judge *had established by his plat*, and which court decided was conclusive of the existence of the street, as there had been no appeal from action of county judge.

The conclusion is inevitable that the plat of county judge is equally potent to show that no street or alley existed when the same was not appealed from.

The court below says in the decision (page 9:) "The grant of the lots to the occupants according to their respective interests necessarily carries with it a dedication of the streets and alleys as they then existed, to the uses and purposes for which they were then used."

There was no dedication of streets and alleys in Helena, except according to the above laws of the Territory, passed in pursuance of § 2387.

Up to the time when the county judge took action under § 2387 there was no dedication of streets or alleys. The title to all of this town-site was in United States. The residents had settled upon it without a shadow of title thereto, until the county judge entered the same at the land office. No action by the residents in regard to streets or alleys prior to that time, no description of lots as binding on streets or alleys could amount to such dedication. The act of dedication must be by the owner of the fee.

Angel on Highways, sec. 154.

The owner of the fee—the United States—made no such dedication until the town was platted into lots, streets,

and alleys by the county judge, or by his adoption of a previous plat.

Field *v.* Manchester, 39 Mich., 279.

Shanklin *v.* Evansville, 55 Indiana, 240.

Livermore *v.* City of Maquoketa, 33 Iowa, 358.

The court below, in its decision on page 8 of record, says the lots in Helena were bought, sold, and conveyed by the boundaries established by Scott's survey, in which this piece of ground was described as an alley; and again at bottom of same page says the owners of these adjacent lots, in their deeds conveying the same, mentioned and described this space of ground as an alley, and argues therefrom a dedication thereof as an alley.

This had no effect on this question because, as before argued, these adjacent owners had no fee in the so-called alley, and could not be estopped as to it by such recitals, nor could the county judge be estopped thereby.

1 Dillon's Mu. Corp., § 498.

Baugan *v.* Mann, 59 Ill., 492.

It cannot be from the above facts and authorities that the ground in controversy was an alley. This was so held by the same Supreme Court of Montana in the suit of Hall *v.* Ashby, (2 Montana, 489.) It was a decision of this same case. The district court had decided this ground to be an alley, and ordered the fence removed. The Supreme Court of the Territory reversed this decision, and sent the case back for a new trial of the issues. Upon this new trial the same decree was entered, and this was affirmed by the said Supreme Court, and from this decision the appeal to this Court is taken. The decision first rendered became the law of the case in the Supreme Court of the Territory, and should have been adhered to.

Washington Bridge Co. *v.* Stewart, 3 How., 425.

Martin *v.* Hunter's Lessee, 1 Wheat., 304.
Phelan *v.* San Francisco, 20 Cal., 45.
Stiver *v.* Stiver, 3 Ohio, 19.

The allegations of the complaint are of a mere private right, and an injury to it by act of defendant. It is not alleged that the premises in question were platted or in any way dedicated to the public use as an alley, but that the plaintiffs in the court below had an easement and right of way over and across the same as such. This complaint is therefore insufficient to sustain the first five findings of fact.

The rule is well settled that the plaintiff must recover, if at all, on the cause of action set out in his complaint, and not upon some other which may be developed by the proofs.

Mondran *v.* Goux, 51 Cala., 151.

If it was a private way, the right thereto rests on prescription or grant, and that fact should be alleged.

If it was a public way or highway, it should be so alleged in complaint.

Green *v.* Palmer, 15 Cal., 411.

The following errors in the decree and decision of the court below are assigned.

1st. The court below erred in holding that the plaintiffs in the court below were entitled to have, hold, use, and enjoy their easement and right of way over, in, and upon the piece of ground in controversy, and for further holding said piece of ground to be an alley.

2d. The court below erred in deciding the fence erected by the plaintiff in error on and upon the said piece of ground was a nuisance, and directing the sheriff to tear down and remove said fence.

3d. The court below erred in enjoining and restraining the plaintiff in error from erecting, or causing to be erected, any fence or obstruction upon the said way or alley, or in any way interfering with or preventing the defendants in error in the free and full use and enjoyment of the same as such way or alley.

4th. The court below erred in its decision that the first five findings were authorized by the allegations of the complaint.

5th. The court below erred in affirming the decision of the 3d judicial district court of Montana.

It is confidently submitted that for these errors the decision of the Supreme Court of Montana Territory should be reversed.

EPPA HUNTON,
JEFF. CHANDLER,
Counsel for Plaintiff in Error.

119-528

SUPREME COURT OF THE UNITED STATES.

HENRY M. PARCHEN *et al. vs.* SHIRLEY C. ASHBY.

MONTANA TERRITORY, *Lewis & Clarke County,* } ss:

E. M. Hoyt, being first duly sworn, says: I am a dealer in real estate in the city of Helena, Montana, and was engaged in that business in the year 1883. I am acquainted with the premises in controversy in the above-entitled action, and am familiar with the value of real estate in that vicinity, and was so familiar with the same in the fall of 1883; that the said premises in the year 1883 were reasonably worth one thousand dollars or more, and that the same ever since have been and yet are reasonably worth said sum; and further say not.

E. M. HOYT.

Subscribed and sworn to before me this 18th day of November, A. D. 1886.

[Notarial Seal W. E. Cullen, Montana Territory.]

W. E. CULLEN,
Notary Public, Montana Territory.

In the Supreme Court of the United States.

HENRY M. PARCHEN *et al. vs.* SHIRLEY C. ASHBY.

MONTANA TERRITORY, *Lewis & Clarke County,* } ss:

Shirley C. Ashby, being first duly sworn, says: I am over the age of twenty-one years, and am the defendant in the above-entitled action. The premises mentioned in the pleadings in said cause were reasonably worth more than one thousand dollars at the date that the appeal was taken in said cause to the Supreme Court of the United States herein. I have resided in Helena, Montana, for more than five years last past, and am acquainted with the value of real estate in the vicinity where said premises are situated, and was so acquainted with the market value thereof at the date of the taking of the appeal herein; and further say not.

SHIRLEY C. ASHBY.

Subscribed and sworn to before me this 18th day of November, A. D. 1886.

[Notarial Seal W. E. Cullen, Montana Territory.]

W. E. CULLEN,
Notary Public, Montana.

In the Supreme Court of the United States.

HENRY M. PARCHEN *et al. vs.* SHIRLEY C. ASHBY.

MONTANA TERRITORY, *Lewis & Clarke County,* } ss:

James P. Porter, being first duly sworn, says: I am a dealer in real estate in the city of Helena, Montana, and was engaged in that business in the year 1883. I am acquainted with the premises in controversy in the above-entitled action, and am familiar with the value of real estate in that vicinity, and was so familiar with the same in the fall of 1883; that the said premises in the year 1883 were reasonably worth one thousand dollars or more, and that the same ever since have been and yet are reasonably worth said sum; and further say not.

JAS. P. PORTER.

Subscribed and sworn to before me this 18th day of November, A. D. 1886.

[Notarial Seal W. E. Cullen, Montana Territory.]

W. E. CULLEN,
Notary Public, Montana.

In the Supreme Court of the United States.

HENRY M. PARCHEN *et al. vs.* SHIRLEY C. ASHBY.

MONTANA TERRITORY, *Lewis & Clark County,* } ss:

Alexander J. Steele, being first duly sworn, says: I am a dealer in real estate in the city of Helena, Montana Territory. In the year 1883 I was abstract clerk in the office of Richard Lockey, a real estate dealer in the said city of Helena. I am acquainted with the premises in controversy in the above-entitled action and with the value of the same and with the value of premises in that locality. The reasonable worth of said premises exceeds the sum of one thousand dollars; and further say not.

ALEXANDER J. STEELE.

Subscribed and sworn to before me this 18th day of November, A. D. 1886.

[Notarial Seal W. E. Cullen, Montana Territory.]

W. E. CULLEN,
Notary Public, Montana.

In the Supreme Court of the United States.

HENRY M. PARCHEN *et al. vs.* SHIRLEY C. ASHBY.

MONTANA TERRITORY, *Lewis & Clarke County,* } ss:

W. E. Cullen, being first duly sworn, says: I was one of the attorneys in the court below in the above-entitled cause. I have served

the annexed affidavits of Shirley C. Ashby, James P. Porter, E. M. Hoyt, and Alexander J. Steele upon Messrs. E. W. & J. K. Toole and William Wallace, Jr., attorneys for respondents, this 18th day of November, A. D. 1886, by delivering true copies of the said affidavits to William Wallace, Jr., a copartner in said firm, at the office of the said firm in Helena, Montana.

W. E. CULLEN.

Subscribed and sworn to before me this 18th day of November, A. D. 1886.

[Notarial Seal James U. Sanders, Montana.]

JAMES U. SANDERS,
Notary Public, Montana.

The originals of above affidavits are on file with the clerk of U. S. Supreme Court.

EPPA HUNTON.

[Endorsed:] In the Supreme Court of the United States. Henry M. Parchen *et al. v.* Shirley C. Ashby. Affidavits as to value of property in controversy. Hunton & Chandler, att'ys for appellants.